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From:

Sent: Wednesday, February 13, 2013 1:52 PM

To:

Cc:

Subject: TFRP reclassification question

Hi: Below is our response to the issues that you raised. My reviewer has read and approved this advice.

The first issue is whether there can be a TRFP when no taxes were ever withheld from the independent contractor's/employee's wages. The short answer to this is "yes." The Supreme Court has held that a responsible person may be held responsible for the TFRP if he or she willfully fails to collect the trust fund taxes, **or** to truthfully account for the taxes, **or** to pay over the taxes to the Service. Slodov v. United States, 238, 246-47 (1978). In this case, the responsible person failed to perform all three requirements. His or her failure to collect/withhold the employment taxes is in and of itself sufficient for a TFRP assessment.

The second issue is whether the "IRS is precluded from raising the Trust Fund Recovery Penalty issue by the closing agreement it signed with the taxpayer...." In the factual situation before us, the taxpayer/corporation treated its employees as independent contractors for tax years , , and . The closing agreement signed by the taxpayer/corporation and the Service provides that the Service will assess and collect only the employment taxes owed for , thus reclassifying taxpayer corporation's workers as employees for that year, and will "discharge" the taxes owed for and . The agreement also provides that the Service will not disturb the taxpayer's classification of workers as independent contractors for tax purposes for any period from January 1, through December 31, . The amount due for is the reduced section 3509 amount, not the full amount of employment taxes. Section 3509 provides a lower calculation of employment taxes in reclassification cases in which the taxpayer's classification of workers as independent contractors was supported by reasonable cause.

An employment tax liability and the corresponding TFRP are two different liabilities: one is owed by the taxpayer/employer; the other is owed by the responsible person. In this case, the Service entered into an agreement with the taxpayer/employer alone pursuant to which the taxpayer/employer is liable for just one of the three years at issue. Although the responsible persons were not parties to this closing agreement, we believe

the Service's application of the lower, section 3509, calculation for extremely difficult, if not impossible, to establish willfulness.

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